

48A C.J.S. Judges § 244

Corpus Juris Secundum | August 2023 Update

Judges

Joseph Bassano, J.D.; Khara Singer-Mack, J.D.; Thomas Muskus, J.D.; Karl Oakes, J.D. and Jeffrey J. Shampo, J.D.

IX. Disqualification to Act

B. Waiver of Disqualification

2. Acts Constituting Waiver

§ 244. Consent—Manner of consent

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Judges](#) 54

Where the disqualification of a judge may be waived by consent, such a waiver may be express by agreement, or it may be implied from conduct.

Where the disqualification of a judge may be waived by consent, such a waiver may be express by agreement,¹ or it may be implied from conduct.² In this respect, consent to the waiver of disqualification is given where the parties expressly agree to permit the judge to entertain motions.³ Further, a defendant affirmatively consents to the waiver of a two judge rule, which requires the consent of all parties if the same judge is to preside over a preliminary hearing and trial where defense counsel instructs the court to proceed and the defendant does nothing after the judge informs all the parties that proceeding with trial is a waiver to the two judge rule.⁴ Also, a peremptory challenge to the qualification of a judge is impliedly waived where the parties stipulate to have that judge hear the case.⁵

There must be compliance with statutory requirements as to the manner in which consent must be manifested, and under some statutes, the consent of the parties must be made in open court.⁶ Further, under some provisions, an express and voluntary relinquishment of the right to challenge the qualification of the judge may be required.⁷ Similarly, under some constitutional provisions regarding the disqualification of a judge, only the express and affirmative oral consent of a party or a party's attorney is sufficient to satisfy the consent requirement, and the requirement cannot be satisfied by acquiescent conduct alone.⁸ Under a federal statute permitting a waiver of disqualification in limited circumstances, a federal judge may accept such waiver only if it is preceded by a full disclosure on the record of the basis for disqualification.⁹ In some jurisdictions, by force of constitutional

or statutory provisions, the consent of all parties is necessary,¹⁰ and there cannot be a waiver by consent where at least one of the parties insists on the disqualification.¹¹

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Footnotes

1 U.S.—[U.S. v. Conforte](#), 457 F. Supp. 641 (D. Nev. 1978), judgment aff'd, [624 F.2d 869](#) (9th Cir. 1980).

S.D.—[Lodermeier v. Class](#), 1996 SD 134, 555 N.W.2d 618 (S.D. 1996).

2 Ga.—[Jackson v. State](#), 146 Ga. App. 736, 247 S.E.2d 512 (1978).

Ind.—[Renforth v. Fayette Memorial Hospital Ass'n, Inc.](#), 178 Ind. App. 475, 383 N.E.2d 368 (1978).

3 U.S.—[Neiman-Marcus Co. v. Lait](#), 107 F. Supp. 96 (S.D. N.Y. 1952).

As to participation in motions as implied waiver of disqualification, see § 241.

Motion to suppress evidence

Pa.—[Com. v. Corbin](#), 447 Pa. 463, 291 A.2d 307 (1972).

4 Okla.—[Nelson v. State](#), 2001 OK CR 4, 21 P.3d 55 (Okla. Crim. App. 2001).

As to participation in proceedings as waiver, generally, see §§ 240 to 242.

5 Ariz.—[King v. Superior Court In and For Maricopa County](#), 108 Ariz. 492, 502 P.2d 529, 60 A.L.R.3d 172 (1972).

6 Conn.—[State v. Kohlfuss](#), 152 Conn. 625, 211 A.2d 143 (1965).

7 Okla.—[Craig v. Walker](#), 1992 OK 1, 824 P.2d 1131 (Okla. 1992).

8 Wash.—[State v. Belgarde](#), 119 Wash. 2d 711, 837 P.2d 599 (1992).

9 U.S.—[U.S. v. Conforte](#), 457 F. Supp. 641 (D. Nev. 1978), judgment aff'd, [624 F.2d 869](#) (9th Cir. 1980).

10 Ga.—[Howard v. Warren](#), 206 Ga. 838, 59 S.E.2d 503 (1950).

11 Mont.—[In re Woodside-Florence Irr. Dist.](#), 121 Mont. 346, 194 P.2d 241 (1948).